STATE OF MICHIGAN

IN THE SUPREME COURT

LAURENCE G. WOLF CAPITAL MANAGEMENT TRUST AGREEMENT DATED MARCH 7, 1990 and LAURENCE G. WOLF, as Trustee and individually,

Plaintiffs/Appellees,

v

CITY OF FERNDALE, MARSHA SCHEER, ROBERT G. PORTER, and THOMAS W. BARWIN,

Defendants/Appellants.

Supreme Court
No: 130748

COA No. 262721

L.C. No. 03-051450-CK
Hon. Edward Sosnick

130748

DEFENDANTS/APPELLANTS' REPLY BRIEF

PROOF OF SERVICE

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ARGUMENT

I. THE COURT OF APPEALS CLEARLY ERRED IN FAILING TO APPLY A NARROW CONSTRUCTION OF THE PHRASE "PROPERTY DAMAGE" IN THE PROPRIETARY FUNCTION EXCEPTION TO GOVERNMENTAL IMMUNITY.

Plaintiff argues that Defendants' position that the phrase "property damage" should be interpreted as physical injury or damage to property would be adding a word to the statute not placed there by the Legislature. Plaintiff is clearly mistaken. The application of the principles of statutory construction supports Defendants' position. The primary rule of statutory interpretation is that the Court is to effect the intent of the Legislature. To achieve this task, the Court must first examine the statute's language. ***Stanton v Battle Creek***, 466 Mich 611, 615; 647 NW2d 508 (2002). When the word is not defined in the statute, the Court is required to give the word its plain and ordinary meaning. Consulting a dictionary is the appropriate means of determining the common, ordinary meaning of a word or phrase. Id at 672.

The Plaintiff's argument in support of the broad construction adopted by the Court of Appeals does not comport with the principles of statutory construction. In contrast to the expansive definition of "property" utilized by the Court of Appeals, the Random House Webster's College Dictionary (2001) defines property more narrowly as "ownership, right of possession, enjoyment or disposal, especially of something **tangible**" (Emphasis added). Thus, property in the above definition refers only to "tangible property". Under the No Fault Act, "damage to tangible property" consists of "physical injury to or destruction of the property and the loss of use of the property so injured or destroyed." MCL 500.3121 (3). Thus, based on the dictionary definition of "property", and the No

Fault Act provision, it is not a strained or far-fetched interpretation to construe "property damage" as physical damage to tangible property. The Defendants' interpretation also reflects the common and ordinary meaning of the phrase "property damage." In ***Amarillo National Park v Terry***, 658 SW2d 702 (Tex 1983) the Texas Court of Appeals noted that property damage is ordinarily understood to mean physical damage.

Further, the well-established principle that exceptions to governmental immunity are narrowly construed also dictates the conclusion reached by the Defendants. In ***Stanton,*** supra, this Court faced with divergent dictionary definitions of the term "motor vehicle" in the motor vehicle exception to governmental immunity concluded that it "must apply the narrow definition" in light of the "basic principle of our state's jurisprudence that the immunity conferred upon governmental agencies and subdivisions is to be construed broadly and that the statutory exceptions are to be narrowly construed."

In ***Nawrocki v Macomb Co Rd Comm'n***, 463 Mich 143; 615 NW2d 702 (2000), this Court overruled ***Pick v Szymczak***, 451 Mich 607; 548 NW2d 603 (1996) because it failed to narrowly construe the exception to governmental immunity. In ***Pick***, the Court held that the highway exception imposed upon the state and county road commissions the duty to install, maintain, repair, or improve traffic control devices, including traffic signs. However, construing the exception narrowly, the Nawrocki Court in ***Evens v. Shiawassee Co Rd Comm'rs***, a companion case, concluded that the word "highway" in the highway exception should be restricted to its physical structure. The Court held that the exception encompasses only the travelled portion, paved or unpaved of the roadbed actually designed for public vehicular travel. See also ***Chandler v. County of Muskegon***, 467 Mich 315; 652 NW2d 224 (2002). (Construing narrowly the word "operation" in the

motor vehicle exception to governmental immunity as encompassing "activities directly associated with the driving of a motor vehicle".)

In this case, although the Court of Appeals acknowledged its duty to narrowly construe the exceptions to governmental immunity, it failed to do so. Instead, the Court of Appeals chose to substitute its policy preference for that of the Legislature. The Court of Appeals concluded:

> We are mindful of our duty to narrowly construe governmental immunity exceptions and of the fact that the purpose of the exceptions is to not to place governmental agencies on an equal footing with private tort feasors. Nevertheless, under the circumstances like those presented in this case, defendants cannot escape scrutiny for their governmental actions that have the direct and beneficial effect in their proprietary endeavors by hiding under the shelter of immunity. (Appendix 32, Opinion p. 5)

However, it is not the role of the Court to interpret a statute based on its own policy preference. As the Court in ***Tyler v Livonia Public Schools***, 459 Mich 382; 590 NW2d 560 (1999) explained:

> Our role as members of the judiciary is not to determine whether there is a "more proper way," that is, to engage in judicial legislation, but is rather to determine the way that was in fact chosen by the Legislature. It is the Legislature, not we, who are the people's representatives and authorized to decide public policy matters such as this. To comply with its will, when constitutionally expressed in the statutes, is our duty. Id at 393 n10.

The Court of Appeals contravened the judiciary's limited role in complying with the will of the Legislature as reflected in the plain language of the statute. The Court of Appeals decision evinces a clear disregard of the Court's duty to narrowly construe the exceptions to the broad grant of immunity.

Plaintiff relies on cases which apply a broad meaning of the term "property". See ***Citizens for Pretrial Justice v. Goldfarb***, 415 Mich 255, 268; 327 NW2d 910 (1982) and ***Peter Bill & Associates Inc. v. Michigan Department of Natural Resources***, 93 Mich

App 724, 733; 287 NW2d 334 (1980). These cases are inapposite. None of these cases involve the interpretation of "property" or "property damage" in an exception to governmental immunity.

It is important to note that Prosser & Keaton on Tort (5TH Ed) classifies the torts of trespass to land, trespass to chattels and conversion under "intentional interference with property". However, the torts of interference with contract and interference with prospective advantage are classified under "economic relations".

In this case, the plaintiff's claim of tortious interference with business relationship seek recovery for damage to financial expectations or loss of business expectancy and not property damage.

II. RES JUDICATA BARS PLAINTIFF'S CLAIMS IN THIS CASE.

Plaintiff argues that res judicata does not apply to this case because the facts and the evidence required to prove this case are not identical to that required in the prior lawsuits. However, assuming arguendo that Plaintiff's assertion is true, the fact that different facts or evidence are needed to prove this case is not dispositive under the broad transactional test of res judicata. As this Court in ***Adair v. State of Michigan,*** 417 Mich 105; 618 NW2d 386 (2004).

> Because this Court has accepted the validity of the broader transactional test in Michigan, we need not consider as dispositive plaintiffs' assertions that the evidence needed to prove this case is different than was needed in Durant 1. Although that fact may have some relevance, the determinative question is whether the claims in the instant case arose as part of the same transaction as did the claims in Durant 1. Whether a factual grouping constitutes a 'transaction' for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit. Id 124-125 citing 46 Am Jur 2d,

Judgments § 533 p 801. (Emphasis added)

In this case, at the heart of each lawsuit filed by the Plaintiff is Defendant's denial of permission for Plaintiff to erect a wireless communication antenna on its property. In the first lawsuit on February 11, 2000 plaintiff sued the City of Ferndale for the denial of AT&T's application for use variance to install the antenna on its property. (See Appendix 5).

In the second lawsuit on June 13, 2000, filed in the Federal Court, the Plaintiff alleged that the City's denial of the variance violated the Telecommunications Act of 1996. (See Appendix 8).

In the third lawsuit on May 21, 2003 (Appendix 23) the Plaintiff alleged that Defendants denied its application for a special use permit to install the antenna. In this suit, Plaintiff alleged that while Mr. Wolf was preparing his application, he learned that AT&T had entered into a lease with the City of Ferndale to place a cell tower on City owned property. (Complaint paragraph 25). Plaintiff also alleged that Defendants denied its application for a special use permit to enable them to usurp the Plaintiff's business opportunity.

The present lawsuit, which is the fourth action filed on July 28, 2003 (Appendix 1), involves the allegation of Defendant's denial of Plaintiff's application for special use permit to install the antenna. This suit also alleged that Defendant City denied the application for use permit so that it could usurp the Plaintiff's business.

All of these lawsuits filed by the Plaintiff stem from the City's refusal to grant Plaintiff permission to install a wireless communication antenna on its building. Thus, the Plaintiff's claims in this case arose as part of the same transaction as did the claims in

the previous lawsuits. The facts are clearly related in time, space, origin and motivation, justifying the application of res judicata under the broad transactional test enunciated by this Court in ***Adair*** supra.

CONCLUSION

In light of the foregoing, Defendants-Appellants, City of Ferndale, Marsha Scheer, Robert Porter and Thomas Barwin, respectfully request this Honorable Court to reverse the Court of Appeals decision and grant Defendants' Summary Disposition or, in the alternative, grant leave to appeal, or remand this case to the Court of Appeals for a determination of the other grounds for summary disposition.

Respectfully submitted,

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